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No. 97-53

In the Supreme Court of the United States

OCTOBER TERM, 1997

JANE M. ROBERTS, GUARDIAN FOR WANDA Y. JOHNSON,
PETITIONER

v.

GALEN OF VIRGINIA, INC., FORMERLY DBA HUMANA
HOSPITAL—UNIVERSITY OF LOUISVILLE, DBA
LOUISVILLE HOSPITAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a claim brought under the private cause of action provision of the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. 1395dd(d), requires proof of an improper motive as a prerequisite for recovery.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to this Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The Emergency Medical Treatment and Active Labor Act (EMTALA) , 42 U.S.C. 1395dd, imposes two principal obligations on hospitals with Medicare provider agreements. 42 U.S.C. 1395dd(e)(2).[1]

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[1] The statutory scheme governing the Medicare program requires participating hospitals to comply with the requirements of EMTALA. 42 U.S.C. 1395cc(a)(1)(I). Almost all non-federal hospitals have Medicare provider agreements. See

First, when an individual comes to a covered hospital and a request is made on the individual's behalf for examination or treatment for a medical condition, the Act requires the hospital to provide "an appropriate medical screening examination within the capability of the hospital's emergency department * * * to determine whether or not an emergency medical condition * * * exists." 42 U.S.C. 1395dd(a). The Act does not define the term "appropriate medical screening examination." The term "emergency medical condition" is defined as a condition "manifesting itself by acute symptoms of sufficient severity * * * that the absence of immediate medical attention could reasonably be expected to result in * * * serious jeopardy [to the health of the individual or her unborn child], * * * serious impairment to bodily functions, or * * * serious dysfunction of any bodily organ or part." 42 U.S.C. 1395dd(e)(1); see generally 42 C.F.R. 489.24.

Second, if the hospital determines that an individual who has come to the hospital is suffering from an emergency condition, the hospital must either provide "for such further medical examination and such treatment as may be required to stabilize the medical condition," or transfer the patient to another hospital in accordance with the provisions of subsection (c). 42 U.S.C. 1395dd(b)(1)(A); see generally 42 C.F.R. 489.24. The term "to stabilize" means "to provide such medical treatment of the [emergency medical] condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual." 42 U.S.C. 1395dd(e)(3)(A). The term "stabilized" is defined accordingly. 42 U.S.C. 1395dd(e)(3)(B).

Correa v. *Hospital San Francisco*, 69 F.3d 1184, 1191 (1st Cir. 1995), cert. denied, 517 U.S. 1136 (1996) ("ninety-nine percent of American hospitals [are] covered by EMTALA"). With the exception of hospitals managed by the Indian Health Service, federally run hospitals are ineligible to enter into Medicare provider agreements. 42 U.S.C. 1395f(c); 42 U.S.C. 1395qq; 42 U.S.C. 1395y(a)(3).

Subsection (c) states that "[i]f an individual at a hospital has an emergency medical condition which has not been stabilized * * *, the hospital may not transfer the individual unless" the individual (or a legal representative) makes an informed, written request to be transferred; a physician has signed a certification indicating that the medical benefits reasonably expected from a transfer outweigh the risks; or, if a physician is not available, a qualified medical person, in consultation with a physician, has made the required risk/benefits determination. 42 U.S.C. 1395dd(c). Subsection (c) further provides that in order for such a transfer to be appropriate, any receiving hospital must agree to accept the transfer of the individual and to provide appropriate medical treatment, and the sending hospital must forward all relevant medical records. 42 U.S.C. 1395dd(c). The Act defines "transfer" to include "discharge" of the individual. 42 U.S.C. 1395dd(e)(4).

A participating hospital that negligently violates a requirement of the Act is subject to a civil money penalty of not more than $50,000 for each such violation. 42 U.S.C. 1395dd(d)(1)(A). A physician who negligently violates a requirement of the Act with regard to an individual in a participating hospital is similarly subject to a civil monetary penalty of not more than $50,000 for each such violation. 42 U.S.C. 1395dd(d)(1)(B). If the violation is "gross and flagrant

or repeated," the physician is also subject to exclusion from participation in Medicare and state health care programs. *Ibid.* See also 42 U.S.C. 1395cc(b)(2). Civil money penalties and exclusions are imposed by the Secretary of Health and Human Services, pursuant to 42 U.S.C. 1320a-7a, as incorporated into 42 U.S.C. 1395dd(d)(1)(A) and (B).

The Act also provides for two private rights of action against participating hospitals, but not against physicians. The Act provides that "[a]ny individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of [EMTALA]" may bring a civil action to obtain those damages that are available for personal injury under the law of the State in which the hospital is located, as well as for appropriate equitable relief against the hospital. 42 U.S.C. 1395dd(d)(2)(A). The Act further provides that "[a]ny medical facility that suffers a financial loss as a direct result of a participating hospital's violation of a requirement of [EMTALA] may" also bring a civil action for those damages that are available for financial loss under the law of the State in which the hospital is located, as well as for appropriate equitable relief. 42 U.S.C. 1395dd(d)(2)(B).

2. Wanda Y. Johnson was injured in May 1992 when she was struck by a vehicle while walking. Her injuries were life threatening, and she was taken to respondent hospital, where she received treatment for the next two months. She suffered a series of infections and other complications, including pneumonia and urinary tract infections. Pet. App. A27.

In July 1992, respondent sought to transfer Johnson, who had no medical insurance, to a nursing home facility. At the time, she had symptoms of an active infection. She was placed on antibiotics and transferred on July 24, 1992, to Crestview, a licensed nursing facility in Indiana after two other nursing homes turned Johnson down following on-site evaluations of her condition by their directors of nursing. Pet. App. A2, A27. Before discharging and transferring Johnson to Crestview, respondent did not take a urine sample to send to the laboratory for culture, nor did it seek to determine whether the antibiotics would kill or eliminate the bacteria causing Johnson's infection. *Id.* at A30-A31. The day after she arrived at Crestview, Johnson's condition deteriorated and she was transported to Midwest Medical Center, an Indianapolis hospital, where she remained for several months, incurring expenses in excess of $300,000. *Id.* at A27. The State of Indiana rejected Johnson's application for medical assistance under the Indiana Medicaid Program because Johnson failed to meet the state residency requirements. *Id.* at A3.

3. On August 30, 1993, petitioner, as guardian for Johnson, filed suit in the United States District Court for the Western District of Kentucky, alleging that respondent had violated EMTALA by transferring Johnson to Crestview before the hospital had stabilized her condition. Petitioner, Johnson's aunt, did not allege that the initial screening that Johnson received was inappropriate, and respondent did not dispute that when Johnson arrived at the hospital she presented an emergency condition. Pet. App. A29.

In a memorandum opinion, entered on November 13, 1995, the district court denied respondent's motion for summary judgment on the EMTALA claim. Pet. App. A45.[2] The court concluded that there was a genuine

[2] Petitioner's complaint also alleged, in Count 2, that respondent acted under color of state law when it transferred Johnson and thus had to comply with constitutional requirements of

issue of material fact as to whether Johnson was stabilized at the time of transfer. *Id.* at A36, A39. Citing the Sixth Circuit's decision in *Cleland* v. *Bronson Health Care Group, Inc.*, 917 F.2d 266, 271 (1990), which the district court described as requiring "the presence of an improper motive as an essential element in a claim for relief under § 1395dd," the district court held that there was also a disputed issue of material fact as to whether the hospital acted with improper motive in transferring Johnson. Pet. App. A37.

The court based its ruling as to improper motive on a statement that a hospital social worker was facing considerable pressure to have Johnson discharged because the hospital was not being paid for her care. Pet. App. A37-A38.[3] Respondent moved for reconsid-

due process and equal protection. Pet. App. A39, A45. The district court granted respondent summary judgment on that claim after determining that respondent did not act under color of state law in transferring Johnson. *Id.* at A42, A46. The court of appeals did not rule on that claim, and petitioner does not present it in this Court. The complaint also alleged, in Count 3, negligence under state law on the part of respondent through its corporate acts, the acts of its employees, and the acts of the doctors as its "ostensible agents." *Id.* at A42. The district court granted respondent summary judgment on that count insofar as it rested on the assertion that the doctors were agents of the hospital, after concluding that the doctors were not the ostensible or apparent agents of the hospital. *Id.* at A43-A44. The court of appeals affirmed that holding. *Id.* at A16-A23. The district court dismissed the remaining portion of Count 3 without prejudice after it rejected petitioner's claims under federal law, *id.* at A53, and that portion of Count 3 apparently was not at issue on appeal.

[3] Joanna Nolte, a representative of Crestview Health Care Facility, testified that Nancy Fred, a social worker employed by respondent, explained to her that "they had been trying to

eration, and in support of its motion, submitted affidavits from the doctors responsible for Johnson's discharge. The doctors all stated that Johnson was stable when transferred and that her financial condition did not influence their medical decision to authorize her transfer. *Id.* at A49-A50. The district court granted summary judgment to respondent because "the plaintiff presented no evidence that either the medical opinion that Johnson was stable or the decision to authorize her transfer was caused by an improper motive[]." *Id.* at A51.

4. The court of appeals affirmed the district court's judgment. Pet. App. A1-A25. The court of appeals stated that the district court "properly interpreted the *Cleland* holding as requiring that a plaintiff prove a hospital acted with an improper motive in order to recover under EMTALA." *Id.* at A10. The court noted that *Cleland* defined the term "appropriate medical screening" not to refer to malpractice or some other standard of care, but rather to refer "to the motives with which the hospital acts." *Id.* at A8-A9 (quoting *Cleland*, 917 F.2d at 272). The court further noted that the *Cleland* court concluded that a showing of improper motive was not limited to a refusal to treat patients because of indigence but also included "prejudice against the race, sex, or ethnic group of the patient; distaste for the patient's condition (*e.g.*, AIDS patients); personal dislike or antagonism between the medical personnel and the patient; disapproval of the patient's occupation; or

discharge and without any avail to other facilities and that she was getting a lot of pressure to discharge this person due to they knew they weren't going to get paid for this person." Pet. App. A14.

political or cultural opposition." *Id.* at A9-A10 (quoting *Cleland*, 917 F.2d at 272).

The court of appeals reasoned that a plaintiff must prove improper motive in order to distinguish an EMTALA claim from a state law claim for malpractice. The court explained:

> We reject the position espoused by [petitioner] that, to succeed on a claim under the EMTALA, she can prove that [respondent's] treatment of Johnson was not uniform to patients suffering the same medical condition as Johnson. Proof of disparate treatment, in [petitioner's] view, distinguishes an EMTALA claim from a state law negligence claim. If we were to adopt this position, however, we would effectively require a hospital, in defense of a claim under EMTALA, to either prove that it breached a standard of care to an individual patient or that it breaches the applicable standard of care with respect to all similarly situated patients. In other words, we would require a hospital to prove that it has committed medical negligence or malpractice.

Id. at A11.

The court acknowledged that the issue in *Cleland* was whether the hospital had afforded the patient an "appropriate medical screening" in accordance with subsection (a) of EMTALA, while the issue in the current case is whether the hospital failed to stabilize a patient with an emergency medical condition in violation of subsection (b) of EMTALA. Pet. App. A12 n.3. The court also noted that the term "appropriate medical screening," the linchpin of the court's analysis in *Cleland*, appears in subsection (a) but not in subsection (b). Nonetheless, explaining that it "s[aw] no rational reason to set forth differing standards

when applying subsection (a) and (b)," *ibid.*, the court of appeals concluded that *Cleland*'s improper motive requirement also applies in cases like this that arise under subsection (b).

As to the merits of the controversy before it, the court of appeals first noted that, under *Cleland*, physicians "are charged with stabilizing a patient's condition as it is known to them." Pet. App. A13. And the court further noted that respondent did not dispute that there was a genuine issue of material fact as to whether Johnson was stabilized when she was discharged by respondent. *Id.* at A14. The court nevertheless affirmed the district court's award of summary judgment for respondent, concluding that the district court correctly found that petitioner had failed to introduce evidence of improper motive that led to Johnson's discharge. *Id.* at A14-A16. Although the court acknowledged the evidence of the statement by the hospital social worker that she was facing pressure to discharge Johnson, the court emphasized that the social worker played no role in determining whether Johnson was in stable condition before she was discharged, and that affidavits of the physicians who were involved stated that Johnson's financial status played no role in the discharge decision. See *ibid.*

Judge Nelson dissented in part. Pet. App. A23-A25. In his view, evidence of petitioner's treating physician that he relied on the hospital's social workers, together with evidence that the social workers were "receiving pressure from [respondent's] administration to get * * * Johnson discharged," *id.* at A25, was sufficient to raise "a genuine issue of fact as to whether [respondent] acted from an improper motive," *id.* at A24.

DISCUSSION

The Sixth Circuit's decision in this case directly conflicts with the Fifth Circuit's decision in *Burditt* v. *United States Department of Health and Human Services*, 934 F.2d 1362, 1372 (1991), which held that improper motive need not be shown in a similar improper transfer case arising under Section 1395dd(b)(1). Moreover, the reasoning employed by the Sixth Circuit in this case, which depends directly on that court's previous holding in *Cleland* that a plaintiff must prove improper motive in order to prevail in an "appropriate medical screening" case brought under Section 1395dd(a), conflicts with decisions of the three other courts of appeals that have expressly rejected an improper motive requirement under that provision. That reasoning also is inconsistent with decisions of the four other courts of appeals that have defined the scope of EMTALA liability with no mention of an improper motive requirement. No other circuit has followed the Sixth Circuit in requiring proof of improper motive to establish a violation of EMTALA.

The issue presented in this case is of substantial importance. Because it can be very difficult to prove "improper motive," the scope of an EMTALA private action in the Sixth Circuit at present is substantially narrower than the scope of such an action elsewhere in the country. Moreover, the Sixth Circuit's decision will predictably make it more difficult for the Secretary to assess civil monetary penalties on offending hospitals or physicians in the Sixth Circuit than elsewhere in the country; hospitals or physicians in the States in the Sixth Circuit will argue that they have not violated the Act, and therefore do not become liable for civil penalties, unless the

Secretary shows that they acted out of improper motives. Accordingly, the petition for a writ of certiorari should be granted.

1. The decision of the Sixth Circuit directly conflicts with the Fifth Circuit's decision in *Burditt*. In that case, a physician transferred a patient in active labor to another hospital without ensuring that the patient's condition was "stabilized" under EMTALA. The court of appeals affirmed a civil penalty assessed against the physician by the Secretary under EMTALA. The court noted that the physician "asks this court to invent a requirement found nowhere in the statute that an improper, or nonmedical, motive for transfer must be proved as an element of all EMTALA transfer violations." 934 F.2d at 1373. The court explained, however, that "[a]s written, EMTALA prevents patient dumping without such a requirement," and the court "refuse[d] to alter the statutory scheme." *Ibid.*

The Fifth Circuit's decision in *Burditt* is directly contrary to the Sixth Circuit's decision in this case. Like *Burditt*, this case involves an EMTALA claim under Section 1395dd(b) that a patient was improperly transferred from a hospital before the patient's condition was stabilized. Yet, the Sixth Circuit in this case expressly noted that its previous decision in *Cleland* "requir[es] that a plaintiff prove a hospital acted with an improper motive in order to recover under the EMTALA," and, contrary to *Burditt*, extended that requirement to an improper transfer claim under Section 1395dd(b), see Pet. App. A12 n.3.

It is true that *Burditt* arose from a challenge to an EMTALA civil penalty imposed by the Secretary, rather than a private damages action under EMTALA. But the Fifth Circuit nowhere relied on

any differences between government enforcement actions and private suits under EMTALA.[4] Indeed, the Fifth Circuit's holding that the improper motive requirement is "found nowhere in the statute," *ibid.*, necessarily rejected the proposition that improper motive is an element of either a government enforcement action or a private suit under EMTALA.

2. The reasoning of the Sixth Circuit's decision in this case also conflicts with decisions of the three other courts of appeals that have expressly refused to inject an improper-motive requirement into an EMTALA cause of action under the Section 1395dd(a) "appropriate medical screening" provision. In addition, the Sixth Circuit's decision conflicts with decisions of four additional courts of appeals whose treatment of EMTALA Section 1395dd(a) claims has made clear that the Act imposes no such requirement.

The Sixth Circuit did not purport to find any language in Section 1395dd(b) that could be construed to

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[4] At the time *Burditt* was decided, the Act required the government to show that a violation was made "knowingly" before imposing a civil penalty. See *Burditt*, 934 F.2d at 1373-1374. Since then, the Act has been amended, and it now requires the government to prove negligence before imposing a civil penalty. See 42 U.S.C. 1395dd(d)(1)(A) and (B). The neighboring provision governing private suits, however, imposes no express requirement that the plaintiff show that a violation was intentional, knowing, or even negligent. 42 U.S.C. 1395dd(d)(2)(A) and (B). That difference suggests that a private plaintiff can prevail on a lesser showing than would be required to impose a civil penalty; it would not support any conclusion that a private plaintiff must make the greater showing of improper motive required by the court of appeals. (The Act provides that a civil penalty may be imposed on a hospital, 42 U.S.C. 1395dd(d)(1)(A), or on a physician, 42 U.S.C. 1395dd(d)(1)(B), while a private plaintiff is given a cause of action only against a hospital, 42 U.S.C. 1395dd(d)(2).)

impose an improper motive requirement. Instead, it relied heavily on its prior decision in *Cleland*, which arose under Section 1395dd(a)'s "appropriate medical screening" provision and held that "'appropriate' must * * * be interpreted to refer to the motives with which the hospital acts." 917 F.2d at 272. The court in this case applied that holding to Section 1395dd(b) because it "s[aw] no rational reason to set forth differing standards when applying subsection[s] (a) and (b)." Pet. App. A12 n.3. Accordingly, the Sixth Circuit's conclusion that "a plaintiff [must] prove a hospital acted with an improper motive in order to recover under the EMTALA," *id.* at A10, rests, at bottom, on the construction in *Cleland* of the term "appropriate medical screening" in Section 1395dd(a).

No court of appeals has agreed with the Sixth Circuit that Section 1395dd(a) requires a plaintiff to show improper motive as an element of an EMTALA screening claim. Three courts of appeals have expressly rejected the contention that a plaintiff must show that the deficiency in medical screening was due to the presence of an improper motive. For example, in *Gatewood* v. *Washington Health Care Corp.*, 933 F.2d 1037 (1991), the D.C. Circuit held that "a hospital fulfills the 'appropriate medical screening' requirement when it conforms in its treatment of a particular patient to its standard screening procedures." *Id.* at 1041. The court specifically rejected any requirement that a violation depends on whether the hospital acted in bad faith, noting that "any departure from standard screening procedures constitutes inappropriate screening in violation of [EMTALA]," and that "[t]he motive for such departure is not important to this analysis, which applies whenever and for whatever reason a patient is denied the same level of care

provided others." *Ibid.* In *Power* v. *Arlington Hospital Association*, 42 F.3d 851, 857 (4th Cir. 1994), which also arose from a claim of inappropriate medical screening under Section 1395dd(a), the Fourth Circuit stated that it was "persuaded that the D.C. Circuit's rejection of an improper motive requirement is indeed the correct approach." And in *Summers* v. *Baptist Medical Center Arkadelphia*, 91 F.3d 1132 (1996), the en banc Eighth Circuit cited the D.C. Circuit's decision in *Gatewood* approvingly, stated that it "depart[ed] from the reasoning of *Cleland*," and held that "[i]f a hospital fails to provide an appropriate medical screening examination, it is liable, no matter what the motivation was for this failure." *Id.* at 1137-1138.

Four other courts of appeals, while not expressly addressing a claim that improper motive must be shown, have formulated the EMTALA inquiry in "appropriate medical screening" cases in ways that are inconsistent with the Sixth Circuit's construction of the Act. Those courts have all concluded that the appropriateness of a medical screening procedure under EMTALA depends on whether it is evenhandedly administered to all patients whose medical conditions are in relevant respects similar, not on proof of the motivation with which the hospital or doctor acted in failing to follow standard screening procedures. See *Correa* v. *Hospital San Francisco*, 69 F.3d 1184, 1192 (1st Cir. 1995) ("The essence of this requirement is that there be some screening procedure, and that it be administered evenhandedly."), cert. denied, 517 U.S. 1136 (1996); *Eberhardt* v. *City of Los Angeles*, 62 F.3d 1253, 1258 (9th Cir. 1995) ("[T]he test is whether the challenged procedure was identical to that provided similarly situated patients."); *Repp* v. *Anadarko Mun. Hosp.*, 43 F.3d 519, 522 (10th Cir. 1994) ("[A] hospital satisfies the requirements of § 1395dd(a) if its standard screening procedure is applied uniformly to all patients in similar medical circumstances."); *Holcomb* v. *Monahan*, 30 F.3d 116, 117 (11th Cir. 1994) ("As long as a hospital applies the same screening procedures to indigent patients which it applies to paying patients, the hospital does not violate [Section 1395dd(a)]."); see also *Marshall* v. *East Carroll Parish Hosp. Serv. Dist.*, 134 F.3d 319, 322 (5th Cir. 1998) ("[A]n EMTALA 'appropriate medical screening examination' is not judged by its proficiency in accurately diagnosing the patient's illness, but rather by whether it was performed equitably in comparison to other patients with similar symptoms.").

3. The Sixth Circuit's decision significantly adds to the plaintiff's burden in an EMTALA case. As courts have recognized, a requirement that a plaintiff establish a hospital's motivation in failing to satisfy the "appropriate medical screening" standard of Section 1395dd(a), or in failing to satisfy the "stabilization" or medically necessary transfer provisions of Section 1395dd(b), would impose a very substantial burden. Regardless of whether the Fourth Circuit was correct in its assessment that "having to prove the existence of an improper motive on the part of a hospital, its employees or its physicians, would make a civil EMTALA claim virtually impossible," *Power*, 42 F.3d at 858, it would at least put civil EMTALA plaintiffs in the Sixth Circuit at a severe disadvantage relative to plaintiffs elsewhere in the country.[5]

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[5] For this reason, we disagree with respondent's contention that "improper motive or bias is implicit within the disparate treatment analysis, and the distinction between the tests util-

Moreover, the Sixth Circuit's decision easily could be read to affect the EMTALA enforcement authority of the Department of Health and Human Services. EMTALA provides that HHS may assess a civil penalty against a hospital or doctor who "negligently violates a requirement of [EMTALA]." 42 U.S.C. 1395dd(d)(1)(A) and (B). Under the Sixth Circuit's ruling, hospitals and doctors can be expected to claim that, in addition to showing negligence, HHS must show improper motivation before it can assess a civil penalty. Indeed, a physician defendant has already made that argument in a case currently on appeal in the Sixth Circuit, *Cherukuri* v. *Secretary of Health and Human Services*, No. 97-4464. The Sixth Circuit's decisions in *Cleland* and in this case will also make it more difficult for the Secretary to exclude hospitals from the Medicare program under the authority granted in 42 U.S.C. 1395cc(a)(1)(I) and (b)(2)(A) (see 42 C.F.R. 489.53(b), 489.24(f)), because

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ized by the circuit courts is one of semantics." Br. in Opp. 7. There is a substantial difference between the Sixth Circuit's requirement "that a plaintiff prove a hospital acted with an improper motive," Pet. App. A10, and the law in other circuits, which permits a plaintiff to show that the statutory standard was violated through inappropriate screening or a failure to stabilize without shouldering the further burden of proving the underlying motive with which the hospital acted. Indeed, the Sixth Circuit affirmed the award of summary judgment to respondent in this case (even though it found a genuine issue of material fact on the question whether petitioner's condition was stabilized) on the ground that petitioner had failed to produce "evidence of a causal relation between the hospital employee possessing the improper motive [*i.e.*, a desire not to treat patients who could not afford to pay] and the discharge of the unstable patient." *Id.* at A16. Such proof would have been unnecessary to withstand a summary judgment motion in the other circuits that have addressed the issue.

defendants will argue that they may not be excluded unless it can be shown that they had an improper motive in violating the Act and applicable regulations.

4. In our view, the Sixth Circuit's holding that an EMTALA violation occurs only if the hospital acted from an improper motive is wrong. The Sixth Circuit did not purport to base its holding on any language in Section 1395dd(b), and no language in that provision provides support for that requirement. Section 1395dd(b) requires that a hospital either "must provide * * * such treatment as may be required to stabilize the medical condition" or must provide "for transfer to another medical facility in accordance with subsection (c)." 42 U.S.C. 1395dd(b). Nothing in that language (or in subsection (c)) suggests that a hospital is excused from liability for a failure to adhere to those requirements, so long as it does so without an improper motive.

Insofar as the Sixth Circuit's decision rests on anything beyond its own view of relevant policy considerations regarding the scope of the EMTALA cause of action, see Pet. App. A10-A11, it rests on that court's construction of the term "appropriate" in Section 1395dd(a) in *Cleland*. Even if that term could be construed to impose an improper motive requirement in cases under Section 1395dd(a), it would provide no basis to impose such a requirement in cases arising under Section 1395dd(b). Although the court of appeals could find no "rational reason" for distinguishing between the two provisions, *id.* at A12 n.3, the difference in statutory language would be sufficient to make such a distinction. More fundamentally, as all of the other courts of appeals to address the issue have decided, the term "appropriate" in 42 U.S.C. 1395dd(a) itself refers to the type of

screening provided to an emergency room patient, not to the motivation underlying a medical screening that fails to satisfy the Act.[6] The word "appropriate" is susceptible to a wide range of meanings, but construing it to mean "without improper motivation" is to confer on the word a meaning not found in any standard dictionary and not known to common usage.[7]

The Secretary of Health and Human Services has construed the relevant EMTALA provisions and has concluded that improper motive is not an essential element of a violation. In the preamble to Interim Final Rules and Regulations that remain in effect and that govern the Department's Health Care Financing Administration and its Office of Inspector General,

[6] There appears to be some disagreement in the courts of appeals regarding whether Section 1395dd(a)'s requirement of an "appropriate medical screening examination" imposes a substantive minimum standard of care or whether instead it merely imposes a requirement that a hospital provide the same care to all patients whose conditions are similar. Compare *Correa*, 69 F.3d at 1192 (screening must be "reasonably calculated to identify critical medical conditions") and *Eberhardt*, 62 F.3d at 1258 ("The touchstone is whether * * * the [screening] procedure is designed to identify an 'emergency medical condition,' that is manifested by 'acute' and 'severe' symptoms.") with *Summers*, 91 F.3d at 1138 ("An inappropriate screening examination is one that has a disparate impact on the plaintiff.") and *Holcomb*, 30 F.3d at 117 ("As long as a hospital applies the same screening procedures to indigent patients which it applies to paying patients, the hospital does not violate [Section 1395dd(a)]."). Because this case does not arise under Section 1395dd(a), that issue is not presented here.

[7] See *e.g.*, *The Random House Dictionary of the English Language* 103 (2d ed. 1987) (defining "appropriate" as "suitable or fitting for a particular purpose, person, occasion"); *Webster's Third New International Dictionary* 106 (1986) ("specially suitable: fit, proper").

the Secretary stated: "Also with regard to appropriate transfers, we note that the Secretary has taken the position that in proving that a hospital or physician violated [42 U.S.C. 1395dd(b)], there is no requirement to prove that the transfer was effected due to some 'impermissible motive.'" 59 Fed. Reg. 32,086, 32,104 (1994). As the regulations note, that position was not a new one, since it had already been accepted by the Fifth Circuit three years earlier in *Burditt*. See p. 11, *supra*. HHS administers the civil monetary fine program created by EMTALA, see 42 U.S.C. 1395dd(d)(3). Accordingly, because HHS's interpretation is reasonable, it deserves deference. See *Martin* v. *OSHRC*, 499 U.S. 144 (1991); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).

5. In addition to the basic question regarding whether improper motive must be shown in an EMTALA suit, the petition for a writ of certiorari seeks further review of two other questions. See Pet. i. Those questions are not discussed in the body of the petition. Failure to include any facts or argument on those issues precludes a "ready and adequate understanding of the points requiring consideration," and is therefore a "sufficient reason" for denying the petition as to those issues. Sup. Ct. R. 14.4.

In any event, neither of the two additional questions warrants review by this Court. One of them concerns whether an EMTALA plaintiff who must prove improper motive under Sixth Circuit precedent must show that the motive affected the discharging physician, in addition to the hospital administration and social services staff. The Sixth Circuit appears to have held, however, not that the improper motive must be shown to have affected the discharging

physician, but that the improper motive must be shown to have affected the decision to discharge the patient. See Pet. App. A16 (petitioner did not produce "evidence of a causal relation between the hospital employee possessing the improper motive and the discharge of the unstable patient"). Accordingly, the question as framed in the petition is not presented in this case.

The other question listed in the petition has to do with whether surgical residents are a hospital's agents under Kentucky law. That question appears to relate to the court of appeals' ruling on petitioner's pendent state law negligence claim. See Pet. App. A16-A23. Such questions of state law do not warrant review by this Court. *Butner* v. *United States*, 440 U.S. 48, 58 (1979); *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944).

CONCLUSION

The petition for a writ of certiorari should be granted with respect to the first question presented.

Respectfully submitted.

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